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No. 89-1372

In The

Supreme Court of the United States

October Term, 1989

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

RAYFIELD NEWLON,

Respondent.

RESPONDENT'S REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Petitioner's representation as to what constitutes the facts in this case stretches the jury's finding of guilt to its extremes. The Missouri Supreme Court's opinion refers only to what the "jury could reasonably have found" State v. Newlon, 627 S.W.2d 606, 609 (Mo banc), cert. denied, 459 U.S. 884 (1982) (App. 119) and a thoughtful analysis of the verdict options available to the jury leads one to the inescapable conclusion that the jury, more likely than not, concluded that Newlon was not the murderer, but was an accomplice.

Missouri law requires that the reviewing court "accept[ ] as true all evidence in the record tending to prove the defendant's guilt . . . together with favorable inferences that can be reasonably drawn therefrom and disregard[ ] all contrary evidence and inferences." State v. Morgan, 592 S.W.2d 796, 805 (Mo banc) vacated on other grounds, 449 U.S. 809 (1980). Applying this widely-accepted rule, the Court drew its inferences accordingly. Significantly, the jury never found nor were they required to find that Newlon actually murdered the victim, Mansfield Dave. State v. Newlon, 627 S.W.2d at 624 (Seiler and Bardgett, JJ., dissenting) (App. 155-156) ("the jury could have found that the defendant, instead of being the principal, was an accomplice of Franz Williams, and that Williams did the shooting . . . [b]ecause the verdict-directing instruction required only that the jury find either 'the defendant or another' killed [the victim]".) State v. Newlon, 627 S.W.2d at 624 (App. 156)

(emphasis in original).

When charged at the penalty phase of the trial with an instruction (Instruction 19, App. 184) that specifically required a finding that "'defendant [and not someone else] murdered Mansfield Dave for . . . money'" the jury found the evidence lacking and acquitted him of that aggravating circumstance. The jury found only that "the murder [not the murderer] of [the victim] involved depravity of mind ***.'" Newlon v. Armontrout, 885 F. 2d 1328, 1338 (8th Cir. 1989) (App. 25) (App. 190).

After exhausting State remedies, the Respondent filed his Petition for Writ of Habeas Corpus in the District Court. After an evidentiary hearing, the District Court found constitutional violations in each of the four arguments Petitioner advanced and granted the Writ. Newlon v. Armontrout, 885 F. 2d 1328, (App. 25) (App. 56, 62-65, 69). The United States Court of Appeals for the Eighth Circuit, in affirming the District Court's holding, did not deem it necessary to address Newlon's Sixth Amendment claim of ineffectiveness of trial counsel (App. 7 n.5), or his claim of Lockett error in the penalty-phase instructions.

ARGUMENT

I.

THE COURT OF APPEALS' CORRECTLY HELD THAT A "DEPRAVITY OF MIND" INSTRUCTION WHICH IS NOT CAPABLE OF OBJECTIVE DETERMINATION BY THE SENTENCER AND NOT SUBJECT TO A LIMITING CONSTRUCTION BY THE MISSOURI SUPREME COURT VIOLATES THIS COURT'S HOLDING IN GODFREY V. GEORGIA, 446 U.S. 420 (1980) AND MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988).

Petitioner correctly notes that this "Court has gone to great lengths" to determine whether statutory aggravating circumstances sufficiently channel the jury's discretion in imposing a death sentence (Pet. Br. 10). Since Godfrey v. Georgia, 446 U.S. 420 (1980), this Court has recognized that the language of this and similar instructions cannot "'make rationally reviewable the process for imposing a sentence of death'" because it lacks "'clear and objective standards' that provide 'specific and detailed guidance'" sufficient to properly "channel the sentencer's discretion." Id. at 428-429, quoting Proffitt v. Florida, 428 U.S. 242, 253 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) and Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Similar aggravating circumstances[1] were constitutionally salvageable only because the statutes could be interpreted to empower the state supreme courts with the capacity to genuinely narrow the class of persons eligible for the death penalty in such a way as to reasonably justify the imposition of a more severe punishment to the death-sentenced defendant when

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[1] Maynard v. Cartwright, 108 S. Ct. at 1858-59.

compared to others found guilty of murder. Zant v. Stephens, 462 U.S. 862, 877 (1983); cf., Gregg v. Georgia, 428 U.S. 153 (1976). If not narrowed, these aggravating circumstances violate the fundamental constitutional requirement of the eighth amendment because the risk of "wholly, arbitrary and capricious" infliction of the death penalty would not be sufficiently minimized. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). See also, Clemons v. Mississippi, #88-6873, slip op. p. 13 n.1 (Blackmun, Brennan, Marshall and Stevens, JJ., concurring in part, dissenting in part) (the majority opinion necessarily implies that the aggravating factor "especially heinous, atrocious or cruel" is unconstitutional).

In this case, the jurors' request for a definition of the ambiguous phrase, "depravity of mind," vitiates any claim Petitioner could advance that the sentencer could have been guided by "'clear and objective standards'". Godfrey v. Georgia, 446 U.S. at 428, because the sentencer's discretion obviously could not have been channeled by an instruction that they probably did not understand. As a result, Petitioner implies that the sole basis for the Court of Appeals' affirmance of the District Court was its obvious conclusion that the jury had no idea what was meant by the instruction's requirement that the murder involve "depravity of mind" (App. 189). The opinion of the Court of Appeals belies such a conclusion. The District Court was affirmed because "the Missouri Supreme Court did not

provide a limiting construction of the term, [depravity of mind], sufficient to satisfy the eighth amendment requirements of Godfrey and Cartwright." Newlon v. Armontrout, 885 F. 2d at 1335 (App. 18).[2]

Petitioner argues that the sentence can be rescued because the Supreme Court of Missouri, six years after its decision in this case, finally held that certain specified factors "must be present before a finding of depravity of mind will be supported by the evidence". State v. Griffin, 756 S.W.2d 475, 490 (Mo banc 1988), cert. denied, 109 S. Ct. 3175 (1989). The factors delineated in Griffin were first conceived in State v. Preston, 673 S.W.2d 1 (Mo banc), cert. denied, 469 U.S. 893 (1984) and included two factual predicates allegedly found by the Missouri Supreme Court in this case, torture and mutilation of the corpse.[3] Neither finding was supported by the evidence. In

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[2] "[T]he 'especially heinous, atrocious or cruel' aggravating circumstance cannot be constitutionally submitted to the jury without a limiting instruction." Clemons v. Mississippi, supra, slip op. p. 15, n.8 (Blackmun, Brennan, Marshall and Stevens, concurring in part, dissenting in part).

[3] The Missouri Supreme Court in Preston, in performing its proportionality review, characterized Newlon's sentence by concluding that there was "[e]vidence of physical torture before death." Preston, 673 S.W.2d at 12. The sentencing jury, however, was never authorized and never found that the victim was tortured. (App. 190). The instructions submitted to the jury omitted any reference to torture (App. 66) even though such a submission, if supported by any evidence, was authorized by the statute:

> (7) The offense was outrageously or wantonly vile, horrible or inhumane in that it involved torture, or depravity of mind. Section 565.012.2, RSMo. 1978.

Preston, the Court considered depravity of mind to include the "infliction of physical or psychological torture upon the victim as when [sic] victim has a substantial period of time before death to anticipate and reflect upon it[.]" Id. at 11. There was absolutely no evidence in this case that the victim ever anticipated his death or felt any physical pain or mental anguish.

The second Preston factor, mutilation of the corpse is also not supported by the facts.

> The principle opinion speculates the second shot fired was to mutilate the corpse, but there is no evidence to support this, nor was any such theory advanced by the prosecutor to the jury.

State v. Newlon, 627 S.W.2d at 632 (Seiler and Bardgett, JJ., dissenting) (App. 174). If the Missouri Supreme Court's mutilation rationale is accepted, all multiple-wound homicides will justify sentencing the defendants to death; hardly a "limiting construction . . . sufficient to satisfy the eighth amendment requirements of Godfrey and Cartwright." Newlon v. Armontrout, 885 F. 2d at 1335 (App. 18). Simply reciting its version of the facts and opining that "'the record supports the finding of depravity.'" does not "indicate that the [Missouri Supreme Court] applied the limiting construction adopted in Preston and Griffin." Newlon v. Armontrout, 885 F. 2d at 1335 (App. 18).

Petitioner's reliance on Preston further compromises Respondent's rights and violates the fundamental principles

embodied in the due process clause of the Fourteenth Amendment and the Ex Post Facto clause of the Constitution. Fair notice of the acts that will be subject to punishment is "fundamental to our concept of constitutional liberty" Marks v. United States, 430 U.S. 188, 191 (1977); accord, Weaver v. Graham, 450 U.S. 24, 28-29 (1981), and includes notice of what penalty will be applied. "Central to the ex post facto prohibition is a concern for "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Miller v. Florida, 107 S. Ct. 2446, 2451 (1987), quoting from Weaver v. Graham, 450 U.S. at 30.

The ex post facto clause has prohibited the enforcement of any law which "aggravates a crime . . . changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. (3. Dall.), 386, 390-91 (1798) (Chase, J.). Judicial construction, as is present in Preston, which alters or expands criminal liability, may not be applied to conduct occurring before it is announced, in the same way that statutes creating crimes or increasing punishments may not be retroactively applied. Marks v. United States, 430 U.S. 188, 191-92 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964); see Rabe v. Washington, 405 U.S. 313 (1972). Because "fair warning of that conduct which will give rise to criminal penalties . . . is fundamental," Marks v. United States, 430 U.S. at 191, the due process clause must apply. The language of Missouri's "outrageously or wantonly vile, horrible or inhumane"

circumstance fails to give adequate due process notice because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhumane.'" Godfrey v. Georgia, 446 U.S. at 428-429. Preston's expansion of criminal liability is ex post facto as to crimes committed before the judicial limitation because it is both "retrospective" and it "disadvantage[s] the offender affected by it." Weaver v. Graham, 450 U.S. at 29. See also, Lanzetta v. New Jersey, 306 U.S. at 456 ("[I]t will be hard to hold that, in advance of judicial utterance upon the subject, [Newlon was] bound to understand the challenged provision according to the language later used by the [Missouri Supreme C]ourt.").

Petitioner's claim, that the Missouri Supreme Court has narrowly applied or construed this statutory provision, is refuted by that court's track record. Of the 68 death cases the Missouri Supreme Court has reviewed[4], 52 have submitted this aggravating circumstance to the jury. Those juries failed to find the existence of the challenged circumstance in only six cases. Of the remaining 46 cases, none have been overturned by the Missouri Supreme Court either on the grounds that this circumstance required a more narrowed construction because it had

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[4] The fact that in 76% of the death cases in this State have been submitted with this circumstance substantiates its popularity among prosecutors as a "catch-all" provision.

been too broadly applied or was unsupported by the record.* E.g., Clemons v. Mississippi, supra, at page 15. (Blackmun, Brennan, Marshall and Stevens concurring in part and dissenting in part).

In his concurring opinion in Preston, Judge Blackmar, noting that the analysis of Godfrey in Judge Seiler's dissent in Newlon's direct appeal "seems essentially sound", nonetheless felt bound by the holding in Newlon even though this respected jurist "simply [could not] believe [that the evidence in Newlon's case] . . . was sufficient under Godfrey v. Georgia . . . ." State v. Preston, 673 S.W.2d at 13. Judge Blackmar's misgivings about the Missouri Supreme Court's justification for affirming the sentence in this case were not displaced. Both the District Court and the Court of Appeals correctly concluded that "the risk of arbitrary and capricious action" violated the eighth amendment. Maynard v. Cartwright, 108 S. Ct. at 1858 (citations omitted) (App. 14) (App. 68).

This Court should deny the Petitioner's request that a Writ of Certiorari be issued.

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* The only time the Missouri Supreme Court has ever set aside a death sentence was when it concluded that the sentence was disproportionate to the life sentence imposed on a co-defendant. State v. McIlvoy 629 S.W.2d 333 (Mo banc 1982).

ARGUMENT

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT DEPRIVED RESPONDENT OF A FAIR TRIAL IN VIOLATION OF HIS RIGHTS TO DUE PROCESS OF LAW.

The Petitioner, in his Questions Presented for Review, contends either that: (1) this Court's holding in Teague v. Lane, 109 S. Ct. 1060 (1989) precludes the relief granted Respondent by the District Court and the Court of Appeals even if those courts correctly concluded that Respondent's due process rights were violated by the prosecutor's penalty phase closing argument; or (2) those two courts were wrong in finding the argument constitutionally infirm. Since the Petitioner does not specifically address the latter point in his argument for certiorari, it is not necessary to argue the merits of the courts' decisions. It is sufficient to simply note that the standard set by the prosecutor's argument and its condonation by the Missouri Supreme Court has been considered synonymous with legalized lynching.[6]

The Petitioner characteristically misstates the Court of Appeals' holding when he asserts that the court did not find that

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[6] "[Since] State v. Newlon, 627 S.W.2d 606 (Mo banc 1982), [t]he word is out that 'anything goes' at the penalty phase. Missouri justice should adhere to a higher standard. The penalty phase should not become a legalized lynching." State v. Leisure, 749 S.W.2d 366, 385 (Mo banc 1985) (Blackmar, J., concurring in part and dissenting in part). The analogy to a lynch mob is embodied in the rallying cry of the prosecutor to this jury: "kill him now. Kill him now." (App. 35-36); See also (App. 33) ("I say to you to kill him . . . .").

the prosecutor's penalty phase closing argument violated the Eighth Amendment. (Pet. Br. 16). It is not true that the court "did not find an Eighth Amendment violation"; rather the court believed that "[t]here was prejudice enough without relying on the Caldwell claims" and accordingly found no need to "address" them (App. 21 n.9) (emphasis added).

To support its Teague claim, Petitioner postulates that the District Court and the Court of Appeals created new law and applied it retroactively.[7] Petitioner identifies two aspects of the Court of Appeals' opinion to support this conclusion: (1) the cases cited in that portion of the opinion were decided after Respondent's conviction became final (October 4, 1982) (App. 13); and (2) the Court of Appeals' did not specifically cite to Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Both arguments are specious. Although the Court of Appeals did not specially cite Donnelly, its controlling influence pervades the Court's analysis of the principles necessary to reach the result dictated by Donnelly. All but one of the cases cited to in the Court of Appeals' opinion are based on, and therefore dictated by, this

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[7] Ironically, the identical argument Petitioner contends cannot be countenanced in this portion of his argument comprises his sole justification for reversal of the Court of Appeals' Cartwright holding, i.e., that the limiting construction held necessary in State v. Griffin, 756 S.W.2d 475 (Mo banc 1988); cert. denied, 109 S. Ct. 3175 (1989) should be applied retroactively to justify Newlon's sentence and its affirmance by the Missouri Supreme Court.

Court's decision in Donnelly.* The only case which does not cite to Donnelly, Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), cert. denied, 478 U.S. 1620 (1986), utilized Donnelly's a comparable fundamental fairness standard articulated in Strickland v. Washington, 466 U.S. 684-685, 696 (1984). The 11th Circuit held that improper argument rendered the penalty phase trial fundamentally unfair because it "'undermine[s] confidence in the outcome' of [the] sentencing proceeding." Id. at 1461.

The Court of Appeals and the District Court measured the damage done by the prosecutor using the due process yardstick of Donnelly and its progeny. Both found that "the jury was subjected to a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process" and as a

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* Each case cites to Donnelly as the benchmark for establishing the appropriate standard for review. Caldwell v. Mississippi, 472 U.S. 320, 337-340 (1985); Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir.) (en banc), cert. denied, 483 U.S. 1023 (1987) (Petitioner "must show that there is a reasonable probability that the error complained of effected the outcome of the trial"); Darden v. Wainwright, 477 U.S. 168, 181 ("The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' [citation omitted] moreover, the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power'" (quoting from Donnelly at 642); Moore v. Wyrick, 760 F.2d 884, 886 (8th Cir. 1985); Tucker v. Kemp, 762 F.2d 1293, 1295 (11th Cir. 1986) ("whether the proceeding at issue was rendered fundamentally unfair by the improper argument") (emphasis supplied); Brooks v. Kemp, 762 F.2d 1383, 1411, 1413 (11th Cir. 1985) (en banc) vacated on other grounds, 478 U.S. 1016 (1986) ("whether the improper argument rendered the sentencing fundamentally unfair"); Coleman v. Brown, 802 F.2d 1227, 1233, 1234 (10th Cir. 1986), cert. denied, 482 U.S. 909 (1987).

result "infect[ed] the penalty proceedings with an unfairness that violates due process." (App. 55-56) (App. 26).

Petitioner argues that certiorari should be granted because due process review of the propriety of penalty-phase argument has not yet been authorized by this Court. Petitioner overlooks that this Court, since 1977, required that all capital-sentencing proceedings must satisfy the dictates of the due process clause, Gardner v. Florida, 430 U.S. 349, 358 (1977); Green v. Georgia, 442 U.S. 95, 97 (1979). Because this court has recognized that: (1) a prosecutor's closing argument can violate due process; and (2) the due process clause is applicable to the sentencing phase of a capital trial, the Court of Appeals' opinion did not announce a new rule of law because the decision does not "break[ ] new ground or impose a new obligation on the State[ ] . . . ." Teague, at 1070. There is no articulated test more rigorous than the due process standard applied in the lower federal courts to assess the prejudicial impact of this improper closing argument and having survived that test Respondent should not be forced back into the storm by the application of a different standard of review to see whether he might this time be "struck by lightening." Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). Petitioner's argument that due process does not apply to penalty-phase arguments must be

rejected.°

Perhaps anticipating this Court's ruling in Butler v. McKellar, 58 U.S.L.W. 4294 (1990), Petitioner finds justification for his conclusion that the result was not "dictated by Donnelly because the Missouri Supreme Court, the Missouri Court of Appeals, and the St. Louis County Circuit Court did not find constitutional error in review of the closing argument. The St. Louis County Circuit Court expressly refused to consider the closing argument because the "issues were addressed on appeal" (App. 114). The Missouri Court of Appeals did not review the closing argument, but simply relied on the holding by the Missouri Supreme Court in Newlon's direct appeal (App. 105). Only the Missouri Supreme Court reviewed and articulated its reasoning for rejecting Respondent's claim of constitutional error. If Petitioner's argument is sound, rejection of any claim by a state court would be conclusive proof that the result could not have been "dictated" by precedent at the time the conviction became final. By this simple commandment, relief from an unjust conviction or sentence would be foreclosed from collateral review, thus abolishing the Writ of Habeas Corpus. If "Congress

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° Because the penalty phase procedure in Missouri "was like the trial on the question of guilt or innocence", Bullington v. Missouri, 451 U.S. 430, 446 (1981), it would be appropriate to examine closing arguments under the same constitutional standard used to assess error in the guilt phase. Accord, Strickland v. Washington, 466 U.S. 668, 686 (because "a capital-sentencing proceeding . . . is sufficiently like a trial, the standard for determining effectiveness of counsel at the sentencing phase is identical.")

established [habeas corpus] review because it perceived a potential 'inadequacy of state procedures to raise and preserve federal claims and was concern[ed] that state judges might be unsympathetic to federally created rights.'" Butler v. McKellar, 58 U.S.L.W. 4294, 4300 (dissenting opinion, Brennan, Marshall, Blackmun and Stevens) (quoting from Kaufman v. United States, 394 U.S. 217, 225-226 (1969), and as an "additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards[ ]" Butler v. McKellar, supra, at 4296, quoting from Teague v. Lane, then it is inconceivable that a state court's rejection of a "constitutional standard" would forever insulate their decision from federal collateral review.

There was ample precedent for the Court of Appeals' due process condemnation of the prosecutor's closing argument. Respondent's rights to a fair sentencing proceeding do not require the application of any new principle of law. The Petition for Writ of Certiorari should be denied.

CONCLUSION

Considering the existence of significant and substantial error that the Court of Appeals did not deem necessary to address, and for the reasons stated herein, this Court should refuse review of Petitioner's case. The judgment of the United States Court of Appeals for the Eighth Circuit should be left intact and this Court should deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

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